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No. 85-251

In the Supreme Court of the United States

OCTOBER TERM, 1985

GRADY P. MORRISON, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner waived his right to notice prior to foreclosure on his mortgage by the Federal Deposit Insurance Corporation.

2. Whether the Federal Deposit Insurance Corporation's effforts to provide petitioner with actual notice prior to foreclosure satisfied the requirements of due process.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 747 F.2d 610. The opinion of the district court (Pet. App. 25a-38a) is reported at 568 F. Supp. 1240.

JURISDICTION

The judgment of the court of appeals was entered on November 27, 1984. A petition for rehearing was denied on May 13, 1985. The petition for a writ of certiorari was filed on August 9, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1979, petitioner and one Dorothy Long were joint owners of real estate located in Ohatchee, Calhoun County, Alabama. In August of that year they mortgaged the property to the East Gadsden Bank (the Bank) in Etowah

County, Alabama, to secure a promissory note given the Bank. Pet. App. 1a-2a. The mortgage contract specified that, if the mortgagors defaulted on the note, the Bank would be entitled to foreclose on the mortgage after publishing notice of the time, place and terms of the mortgage sale once a week for three successive weeks in a Calhoun County newspaper (*id.* at 2a).[1] At the time of this transaction, petitioner and Long supplied the Bank only with Long's address in Attalla, Alabama, which apparently already was outdated (*ibid.*). Simultaneously with the execution of the mortgage, petitioner conveyed his interest in the property to Long, although he retained his rights and obligations as a mortgagor (*ibid.*). In August 1980, however, Long abandoned the property, leaving the bank with no forwarding address. The note then went into arrears.

In December 1980, before action had been taken against the mortgagors, the Superintendent of Banks for the State of Alabama closed the Bank. The Federal Deposit Insurance Corporation (FDIC) was appointed receiver and acquired the note and mortgage. Pet. App. 2a. The FDIC then attempted to notify petitioner and Long that the note was delinquent. It first wrote to the Etowah County address that had been provided to the Bank; that notice was returned, marked " '[a]uthorized time for forwarding expired' " (*id.* at 2a-3a). The FDIC then attempted to obtain a forwarding address by contacting the Attalla Postmaster, who responded that he had " '[n]o address' "

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[1]This contractual provision comported with Alabama law, which provides that notice of a mortgage sale "shall be given in the manner provided in such mortgage * * * provided, that notice of all sales under powers of sale * * * shall be given by publication once a week for three successive weeks in some newspaper published in the county in which such land or any portion thereof is situated." Ala. Code § 35-10-8 (1977).

and no record of a forwarding address (*id.* at 3a; Tr. 20). The FDIC also made unsuccessful inquiries at the Bank itself (Tr. 27).[2]

Unable to contact petitioner or Long, the FDIC published the three notices required by the mortgage contract, sent personal notice to the Attalla address (Tr. 22-23), and then held a foreclosure sale. At the sale, the FDIC itself purchased the property for $15,640. Petitioner's debt was reduced by that amount, leaving a balance of $6,461 due on the note. Pet. App. 3a.

Two months after the sale, in June 1982, petitioner contacted the FDIC to inquire about the note. The FDIC informed petitioner — who, it developed, lived in Bynum, Alabama, 17 miles from Ohatchee (Tr. 42, 58) — of the foreclosure sale.[3] In August 1982 the FDIC brought suit against petitioner in the United States District Court for the Northern District of Alabama, seeking payment of the balance of his debt. Pet. App. 3a. Petitioner responded that he should not be liable for the debt because the FDIC denied him due process by foreclosing on the mortgage without providing him with actual notice prior to the foreclosure sale (see *id.* at 4a).

The district court ruled for petitioner. Relying on *Mennonite Board of Missions* v. *Adams*, 462 U.S. 791 (1983), the court held that "constructive notice of a foreclosure

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[2]While the district court found (see Pet. App. 3a) that an inquiry in the Ohatchee area would have disclosed petitioner's whereabouts, FDIC had no reason to know that petitioner resided in that area (see Tr. 28-29).

[3]Following foreclosure, Alabama law gave petitioner a statutory right of redemption, which entitled him to redeem the property by paying the amount due on the note within one year of the foreclosure sale (see Pet. App. 6a, citing Ala. Code § 6-5-230 (1977)). Petitioner, however, made no attempt to redeem the property, although he had 10 months to do so following his receipt of notification of the sale.

sale" is inadequate to satisfy due process requirements "even where the practice [of constructive notice] has previously been long recognized by state statute and is contained in the mortgage contract itself" (Pet. App. 32a). The court also held that the FDIC's efforts to provide notice by mail did not satisfy the *Mennonite Board of Missions* standard, finding that the FDIC "did not make reasonably diligent efforts to ascertain [petitioner's address], which could have been easily determined by appropriate inquiry" (Pet. App. 35a). The court therefore held that the foreclosure sale was invalid and that the FDIC was precluded from claiming a deficiency against petitioner (*id.* at 36a).

The court of appeals reversed. The court agreed that petitioner's equity of redemption — his common law right to redeem the mortgaged real estate — was property within the meaning of the Due Process Clause (Pet. App. 6a-9a). But the court reasoned that the FDIC's action had not deprived petitioner of that property. Instead, the court explained that "[t]he blame for turning the once-hypothetical foreclosure into reality lies solely with the mortgagors," whose default triggered the foreclosure sale; "[i]t ill becomes a solvent debtor whose delinquent note has contributed to his mortgagee's ruin to complain that the FDIC, struggling to minimize the damage from East Gadsden Bank's collapse, has been a more vigilant creditor than the bank" (*id.* at 10a). The court also held that the FDIC's actions did not terminate petitioner's statutory right to redeem (see note 3, *supra*). To the contrary, that right only came into existence *after* foreclosure took place. Pet. App. 11a.[4] The court therefore ruled that the FDIC's actions did not deny petitioner due process.

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[4]The court of appeals denied petitioner's request for rehearing en banc (Pet. App. 14a-15a) over a dissent by Judge Clark (*id.* at 16a-24a).

ARGUMENT

Petitioner's claim rests on the proposition that the court of appeals misunderstood *Mennonite Board of Missions* (see Pet. 6). In fact, however, that case is wholly inapposite here. Further review accordingly is not warranted.[5]

1. *Mennonite Board of Missions* involved the sale of real estate by Elkhart County, Indiana, for failure to pay property taxes. The Indiana law in effect at the time did not require that notice of the sale be provided to mortgagees of the property, although sale of the property could lead to termination of the mortgagee's rights. 462 U.S. at 792-794. Prior to the sale, notice was mailed to the mortgagor and was published; in accordance with state law, however, notice was not provided to the mortgagee. *Id.* at 794. The Court held that this scheme deprived the mortgagee of its interest in the property without constitutionally adequate notice, explaining that a mortgagee "is entitled to notice reasonably calculated to apprise him of a pending tax sale." *Id.* at 798.

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[5]We also note that, while the court of appeals found it unneccesary to decide the question (see Pet. App. 5a), it is unlikely that FDIC's foreclosure activities amounted to an assertion of governmental power of the sort that is subject to due process requirements at all. "As a party to the contract, * * * even * * * a governmentally-owned and authorized entity * * * ha[s] a right to resort to its contractual remedies just as a purely private entity ha[s]." *Warren* v. *GNMA*, 611 F.2d 1229, 1234 (8th Cir.), cert. denied, 449 U.S. 847 (1980). See *Northrip* v. *FNMA*, 527 F.2d 23 (6th Cir. 1975). And it is well-settled that a private party's use of a power of sale clause to foreclose on a mortgage does not involve state action. See *Rank* v. *Nimmo*, 677 F.2d 692 (9th Cir.), cert. denied, 459 U.S. 907 (1982); *Levine* v. *Stein*, 560 F.2d 1175 (4th Cir. 1977), cert. denied, 434 U.S. 1046 (1978); *Barrera* v. *Security Building & Investment Corp.*, 519 F.2d 1166 (5th Cir. 1975); *Northrip* v. *FNMA, supra*; *Bryant* v. *Jefferson Federal Savings & Loan Ass'n*, 509 F.2d 511 (D.C. Cir. 1974).

This principle is inapplicable here, however, because the so-called "power of sale" — the provision of the mortgage contract permitting sale of petitioner's property upon notice by publication — "was created, not through governmental enactment, but by private consensual agreement." *Bryant* v. *Jefferson Federal Savings & Loan Ass'n*, 509 F.2d 511, 513 (D.C. Cir. 1974). Unlike the mortgagee in *Mennonite Board of Missions*, petitioner thus consented to foreclosure of the mortgage after notice by publication. That the agreement containing the consent subsequently was acquired by the FDIC as a result of the Bank's failure does not affect this principle.

In such circumstances, there is no doubt that "[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver." *D.H. Overmyer Co.* v. *Frick Co.*, 405 U.S. 174, 185 (1972). See *Swarb* v. *Lennox*, 405 U.S. 191, 200 (1972); *National Equipment Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315-316 (1964). Petitioner has made no claim that he was unaware of the meaning of the power of sale clause when he signed the mortgage contract, or that his signature was not knowing and intelligent; to the contrary, he acknowledges (Pet. 11) that mortgagees in Alabama traditionally have included notice of sale clauses in their contracts. Cf. *Fuentes* v. *Shevin*, 407 U.S. 67, 95-96 (1972); *Overmyer*, 405 U.S. at 185-187. The due process principles upon which petitioner relies therefore have no bearing in this case.[6]

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[6]Petitioner asserts (Pet. 6, 13-14) the existence of a conflict in the circuits on the applicability of *Mennonite Board of Missions* to mortgage foreclosures such as the one here. For this proposition, however, petitioner cites only a single district court decision. *United States* v. *Whitney*, 602 F. Supp. 722 (W.D.N.Y. 1985). And that decision itself distinguished the ruling here. *Whitney* held that a person who was liable on a mortgage in New York was not bound by foreclosure proceedings to which he was not a party. The *Whitney* district court explained that

2. In any event, even if it was bound to comply with constitutional notice requirements, the FDIC's efforts to provide petitioner with notice plainly comported with due process standards. In contrast to the county officials in *Mennonite Board of Missions*, the FDIC sent a notice of delinquency to the "last known available address" (462 U.S. at 798) — the Attalla address provided to the Bank by petitioner and Long. When that failed to reach petitioner, the FDIC made an inquiry of the Postmaster in the area, and made further inquiries of the Bank. The Due Process Clause did not require further, "extraordinary efforts" on the part of the FDIC. *Id.* at 799 n.4. That is particularly true in a case such as this one; as the court of appeals suggested, petitioner should have been aware that his failure to meet his obligations made foreclosure possible. Cf. *Northrip* v. *FNMA*, 527 F.2d 23, 33 (6th Cir. 1975). Indeed, even after petitioner received actual notice, he retained his statutory right of redemption.

That the FDIC's efforts here should be deemed adequate to satisfy the "flexible" requirements of due process (*Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)) is confirmed by a consideration of the burdens that would follow from petitioner's insistence that actual notice be provided in every case. The FDIC reports that it is in the process of liquidating more than $10 billion worth of property, involving 122,000 separate assets, from some 200 failed banks.[7] When it acquires the assets of a failed bank, the FDIC obviously must take the bank records as it finds them. Requiring the

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the Eleventh Circuit's ruling in this case was inapplicable to the facts before it "because New York law differs from Alabama law"; the former provides that a party to a mortgage cannot be held liable for a deficiency after a mortgage sale unless he was a defendant in the foreclosure action and either appeared or was personally served. 602 F. Supp. at 732 n.10.

[7]These figures are derived from the *1984 FDIC Annual Report*.

FDIC to look behind the addresses provided by the mortgagors of these assets — and to make inquiries beyond the reasonable ones made here — accordingly would impose extraordinary "fiscal and administrative burdens" on the agency. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1985